ATS Acquisition Corp., Inc. and International Alliance of Theatrical Stage Employees. Case 31–CA–20089

July 12, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 8, 1995, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs. The General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions. The Respondent filed an answering brief to the Charging Party's exceptions, and reply briefs to both the General Counsel's and the Charging Party's answering briefs to the Respondent's exceptions

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, ¹ and conclusions² and to adopt the recommended Order³ as modified below.

We agree with the judge that ATS, the Respondent, is the successor employer to CVS, and that it violated Section 8(a)(5) of the Act by failing and refusing to recognize and bargain with the Union. In reaching this conclusion, we also agree with the judge that the historical bargaining unit was an appropriate unit for collective bargaining and that this unit remained appropriate after the takeover.4 We disagree, however, with the judge's conclusion that the historical bargaining unit should be expanded to include the employees now working at the Respondent's 2820 Olive Avenue facility. As the judge explained, after the Respondent became CVS' successor on August 5, 1993, it commenced building a new technical service center on Olive Avenue near the two Alameda Avenue facilities. From approximately January through May 1994, the Respondent transferred approximately 20 unit telecine and professional employees from the two Alameda Avenue facilities and approximately 30 nonunit technical employees from Lankershim Boulevard to the Olive Avenue facility. The judge found that the 30 nonunit employees should be included in the bargaining unit because of their "close proximity" with unit employees, and amalgamation in a "core unit that is defined by job classifications." He also found that the "Respondent should not profit from its deliberate mixing of such employees while in a mode of unremedied unfair labor practices." We disagree with the judge's findings in this regard and, for the following reasons, conclude that none of the Olive Avenue employees should be included in the bargaining unit.

As an initial matter, we shall apply the "Board's long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit." *Gitano Distribution Center*, 308 NLRB 1172, 1175 (1992). We find that this presumption has not been rebutted here and that the Olive Avenue unit constitutes a sepa-

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We agree with the judge that the established bargaining unit is appropriate. However, we do not rely on his discussion of *Compact Video Services*, 284 NLRB 117 (1987). In that case the Board found that the Respondent's employees at Chestnut Street were not an accretion to the existing bargaining unit at Alameda Avenue. The issue of the appropriateness of this unit was not then before the Board as it is now

³The judge's recommended Order is correct. However, we note that the judge made some erroneous findings in the remedy section of his decision. He misconstrued Sunland Construction Co., 311 NLRB 685 (1993). In that case, the Board reiterated the principle that a charging party has standing to seek extraordinary remedies even if such remedies are not being sought by the General Counsel. However, a charging party is not free to seek remedies contingent on an amendment to the complaint or a theory of the case different from that of the General Counsel. Sunland Construction, supra at 706. Here, the General Counsel alleged in the complaint that the Respondent had a duty to bargain because of its status as successor employer. The General Counsel did not allege that the Respondent made unlawful unilateral changes in terms and conditions of employment. Indeed, the General Counsel repeatedly stated at the hearing that he was not alleging that the Respondent made unlawful changes in the terms and conditions of employment and that he was not seeking backpay. Under these circumstances, the Charging Party had no standing to seek backpay and the judge erred in so finding. Accordingly, we do not pass on the judge's discussion of the "perfectly clear" doctrine of NLRB v. Burns Security Services, 406 U.S. 272 (1972), and his discussion of related Board cases, including Spruce

Up Corp., 209 NLRB 194 (1974), and Canteen Co., 317 NLRB 1052 (1995).

Finally, we agree with the judge, for the reasons he cites, that the fourth floor 2901 Alameda Avenue "Disney" employees are not part of the existing bargaining unit. In this respect, we note the record shows that when the Compact Video Group, Inc. (CVG) acquired the Disney contract on February 28, 1992, CVG simply moved the prior subcontractor's employees onto the CVG payroll and incorporated them within CVG's managerial structures. The "Disney" employees remained on the CVG payroll at least until the Respondent became the successor employer on August 5, 1993. As CVG employees, they were not covered by the collective-bargaining agreement. The agreement is between International Alliance of Theatrical Stage Employees (IATSE) and Compact Video Services, Inc. (CVS).

We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

⁴The Board has long held that it will not disturb the recognition of an established bargaining unit unless required by the Act or compelling circumstances. *CitiSteel USA, Inc.*, 312 NLRB 815, 816 fn. 8 (1993), enf. denied on other grounds 53 F.3d 350 (D.C. Cir. 1995).

rate and independent bargaining unit apart from that at the Alameda Avenue locations. Further, under the "fact-based majority test" set out in Gitano, supra, we also find that the Respondent is not obligated to recognize and bargain with the Union as the representative of the unit employees at the Olive Avenue facility because a majority of those employees were not in the bargaining unit prior to their transfer to the new facility.5 In making this finding, we note that there is no allegation that the Respondent unlawfully transferred any of these employees to the Olive Avenue facility. Thus, as noted above, we find, contrary to the judge, that the employees transferred to the Respondent's Olive Avenue facility from the Alameda Avenue and Lankershim Boulevard locations should not be included in the historical bargaining unit found appropriate here.6

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, ATS Acquisition Corp., Inc., Burbank, California, its officers,

If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, we will presume that those employees continue to support the union and find that the employer is obligated to recognize and bargain with the union as the exclusive collective-bargaining representative of the employees in the new unit. Absent this majority showing, no such presumption arises and no bargaining obligation exists.

⁶ Moreover, even if the single facility presumption were rebutted here, we would still find, contrary to the judge, that the nonunit employees transferred from Lankershim Boulevard to Olive Avenue should not be accreted into the bargaining unit. As an initial matter, we emphasize that the Board's policy on accretion is restrictive because employees accreted to an existing unit are not accorded a selfdetermination election, and we seek to safeguard the right of employees to determine their own bargaining representative. Towne Ford Sales, 270 NLRB 311 (1984), affd. sub nom. Machinists District 190 v. NLRB, 759 F.2d 1477 (9th Cir. 1985). Further, the Board has long held that when parties to a bargaining relationship have excluded a group of employees from an established bargaining unit, the Board will not clarify the unit to include those employees unless substantial changes have occurred, creating a real doubt whether the excluded employees should now be included in the unit. Gitano, supra at 1173-1174, and cases cited at 1174 fn. 10. Here, the parties did not raise the status of the Lankershim Boulevard employees at their most recent negotiations. Indeed, the Lankershim Boulevard employees retained their status as employees excluded from the established bargaining unit in the current collective-bargaining agreement running from August 1, 1992, until July 31, 1996. In these circumstances, accretion would not be appropriate here.

Member Cohen finds it unnecessary to rely on the alternative argument set forth above. In this regard, he notes that there is no demonstrable workplace difference between the Olive Avenue employees who previously worked at the two Alameda facilities, and the Olive Avenue employees who previously worked at Lankershim. Thus, in Member Cohen's view, it is questionable whether the former group now has a "community of interest" that is different from the latter.

agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 2(b) and (c). "(b) Within 14 days after service by the Region, post at its facility in Burbank, California, copies of the attached notice marked 'Appendix.'5 Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Re-

"(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

spondent at any time since August 19, 1993.

Ann L. Weinman, for the General Counsel.

Richard W. Kopenhefer, Raymond W. Thomas, and Richard S. Zuniga (Loeb & Loeb), of Los Angeles, California, for the Respondent.

Ira L. Gottlieb (Taylor, Roth, Bush & Geffner), of Burbank, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard on an intermittent 13 days of trial commencing March 1, 1994, and concluding January 31, 1995. There were no days of hearing during the period March 16 to October 18, 1994, when the trial was in abeyance pending subpoena enforcement proceedings before a United States District Court

The charge was originally filed August 19, 1993 (then amended September 27, 1993), by International Alliance of Theatrical Stage Employees (IATSE or the Union), and the complaint issued October 12, 1993. The primary issues in this matter are whether ATS Acquisition Corp., Inc. (Respondent or ATS) is a successor employer, if so whether a historical unit of employees is appropriate for bargaining, and if that is also the case whether Respondent's refusal to bargain with IATSE is a violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of witnesses, and after considering briefs filed by the General Counsel, Respondent, and the Union, I make the following

⁵The "test" is set out at *Gitano*, supra at 1175 (footnotes omitted):

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and at all times material has been, a Delaware corporation, with an office and places of business primarily in Burbank, California, where it engages in postproduction services to the film and television industry. Respondent commenced operations primarily in Burbank on or about August 5, 1993, and based on a projection of its business operations since that date will, in the course and conduct of its business operations, annually purchase and receive at its Burbank facilities goods valued in excess of \$50,000 from suppliers located within the State of California, which suppliers receive such goods in substantially the same form directly from points outside California. On these established facts, I find and Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and otherwise as also admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Case Summary

In mid-1993 Respondent acquired a failing enterprise then engaged in postproduction services for commercial film and television. Its services included film editing, tape editing, sound editing, duplication, standards conversion, telecine, film laboratory, film and videotape storage, and satellite transmitting. The acquired enterprise had undergone changes in scope and type of its business during 10 years or more preceding the acquisition. It was principally operating at the time Burbank facilities, and other places not far distant from the hub. The overall enterprise so acquired was named Compact Video Group, Inc. (CVG), and the largest of its several constituent corporations was named Compact Video Services, Inc. (CVS).

Approximately 200 persons were employed by all components of CVG at the time of acquisition, about 100 of these being with the CVS entity. A collective-bargaining agreement between CVS and IATSE covered many of the CVS employees. Other CVS personnel, including those performing like work to bargaining unit employees in a same building, were not covered by this contract. Smaller corporate components of CVG also had personnel performing like work to bargaining unit employees of CVS, but for the most part at other physical locations.

In accordance with Respondent's general intentions of making this acquisition into a profitable investment, it immediately began organizational changes and infusing capital. Various operations were consolidated by major construction work, and technologically current equipment was purchased. The process was a constantly evolving one, and essentially made complete by late 1994.

IATSE had promptly requested recognition from Respondent for its then long-existing CVS bargaining unit; however, this was almost as promptly denied. By late 1994 numerous employees of the bargaining unit were physically relocated, and previously unrepresented persons of like function intermingled to work with such bargaining unit employees as had relocated.

This summary frames the issues of whether Respondent is a successor based on *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and if so, as the General Counsel contends, whether the CVS bargaining unit as existing in mid-1993 was an appropriate one under the Act. The Union makes an affirmative contention on both issues, but seeks a broader remedy than what the General Counsel advocates. Respondent contends it is not a *Burns*-type successor, and alternatively with even more vigor that the unit is and was inappropriate and thus legally undeserving of recognition.

B. General Facts

1. Business evolution

An understanding of this situation may usefully begin with 1984, when John Donlon, a person of experience in the industry, became chief operating officer of Compact Video, Inc. His office was at the business location of 2901 W. Alameda Avenue, in Burbank. Compact Video, Inc., as then known and named, was engaged in postproduction services for the motion picture business and television programming, the manufacture of specialized studio intercom equipment, and a "production" operation for mobile support to studios for the videotaping of television shows. This production service was a unionized part of the CVS subsidiary at the time, an entity also performing editing, sound re-recording, telecine work, some duplication, and a small amount of satellite transmission. The vehicles used in CVS production work were garaged at a company facility on Chestnut Street in Burbank, about 3 miles distant from central activities on Alameda Avenue.

Another subsidiary of Compact Video, Inc. in 1984 was Image Transform, Inc., which operated on Lankershim Boulevard in North Hollywood. This is about 5 miles distant from the principal location of CVS. The business of Image Transform included telecine transfer, tape to film transfer, standards conversion, foreign television "PAL" (European) and "NTSC" (North American Standard) duplication. The Image Transform component of the enterprise also maintained a film laboratory (Image Lab) on San Fernando Road in Burbank, where printing and processing motion picture film was performed along with small format duplicating and tape to film conversion. This operation is estimated to be 10 miles distant from the CVS headquarters.

Early after Donlon's association with the enterprise in the mid-1980s two of the subsidiaries were closed or sold. The nonunionized specialty intercom manufacturing operation (RTS) ended, and a duplicative Vidtronics subsidiary was closed by some movement of its equipment and personnel to CVS at 2901 Alameda Avenue. The dub (duplication) room personnel so relocated to Alameda Avenue in this connection, and those that had performed telecine became included in the CVS bargaining unit. Another group from the Vidtronics syndication distribution business, comprising customer relations and service employees, those doing shipping and receiving, and vault personnel were relocated to the Chestnut Street building, where they did not come under coverage of the CVS bargaining unit. Syndication is the alternative in profiting from a television show that has not won acceptance by a network. In such event the show producer sells the show to as many independent television stations as possible, and with established dates of airing for particular broadcast locations throughout the country. Traditionally, videotapes of syndication programming are delivered to television stations by commercial package express service; however, this method is increasingly giving way to satellite transmission when the station has the capability of receiving that signal. This Vidtronics closure also featured a rebuilding of the first floor of another CVS building at 2813 West Alameda Avenue, where telecine machines were relocated as well as an editing system.

By the late 1980s Compact Video, Inc. had been renamed CVG, and Donlon had acceded to the position of chief executive officer for CVS. He was also by then, if not before, president of CVG. In about 1989 the former film sound department of CVS was incorporated as the separate and distinct Meridian Studios, Inc. for better business identity and direction. In that same year CVS entered into arrangements in which the Disney television channel broadcast from its Alameda Avenue facility, with the necessary tape operations center (TOC) run by a contracted intermediary company called Stars. However, typical postproduction editing and sound mixing was provided from the beginning through a contract between CVG and Disney. This overall arrangement with Disney lasted until 1992 when Stars was terminated. By modified agreement with Disney CVS then continued operating the channel, after hiring 95 percent of the individuals that had done so before. This was a total of about 30 employees taken on by CVS. These technical personnel needed to service the Disney channel remained outside the CVS bargaining

2. Labor relations outline

The earliest collective-bargaining agreement between CVS and IATSE in evidence is one having a term of August 1, 1981, through July 31, 1984. This agreement defines its bargaining unit by "trade jurisdiction." The job positions set forth in this agreement, but not necessarily as limitation, are videotape machine operators, videotape editors, maintenance engineers, film transfer technicians, electronic graphics operators, computer personnel, fabrication, art and graphics departments, boommen, audio two technicians, audio mixers, video projection technicians, telecine operators, recotech, tape cleaning, repair, and evaluation and storage, plus the inclusion of "all categories as set forth in wage schedules." An example of a separate job title in the wage schedules, but not specifically listed in the main group of classifications, is "vault" personnel. This collective-bargaining agreement was termed an "in-house" contract.

Succeeding multiyear in-house agreements between CVS and IATSE followed for the decade of the 1980's and beyond. The latest contract has a term of August 1, 1992, through July 31, 1996. A side letter of agreement signed early in 1993 affirmed that "current practices" as to "interchangeability of work between the various classifications and film and tape work in postproduction work" were such as to make applicable a "basic" agreement of the industry and IATSE. The employer party to this "basic" agreement was the Alliance of Motion Picture & Television Producers (AMPTP).

In a separate development, Donlon executed an agreement of consent on behalf of Meridian in late 1989, in which that entity agreed "to become a party to and to be bound by" the "basic" IATSE agreement. The chief purpose of this act

was to have flexible contractual validity in hiring daily personnel, which Meridian could then utilize more effectively.

3. Acquisition details

Steinhardt Partners is a New York City headquartered investment entity that was the root of this acquisition. The August 1993 transaction followed an industry study and earlier unsuccessful attempt to purchase a CVG competitor. As CVG slid toward probable bankruptcy and closure in mid-1993, the functionaries of Steinhardt structured an overall arrangement for the takeover of CVG.¹

A limited partnership vehicle was created in which CVG and its subsidiaries were a part. This limited partnership in turn incorporated ATS as the acquiring entity. Financing of the transaction was essentially a \$4 million payment to CVG's preferred creditor, and a restructured secured loan to ATS which liquidated the balance of what CVG or its entities owed. ATS emerged as the purchaser of all CVG assets, and the controlling organization of the business. CVG and its entities continued their corporate existence after the transaction, but this existence had no further significance to the ongoing business or issues of this case.

The purchase was effective Wednesday, August 4, and ATS commenced operations in its own right on August 5. It was unmistakably headed by Robert (Rob) Walston, an investment specialist of Steinhardt. He chaired the ATS board of directors, a body which included Donlon and John Sabin, former chief financial officer of CVG and its entities. Walston also held the designation of chief executive officer for ATS, while Donlon was named president of the corporation.

As the transaction had proceeded during July and the earliest days of August with uncertainty of fulfillment and increasing urgency, Walston and Donlon each issued letters dated on Friday, July 30 to the employees of each CVG operating entity. Both of these one-page letters referred to an agreement in principle for the transfer of all CVG assets. Donlon's letter went on about the company's heavy debt obligations, unprofitability, and lack of any viable option except to sell. He estimated the sale would close during the following week, and advised that ATS would soon offer employment.

Walston's letter focused on what the employees could expect next. He signed it as chairman and CEO of ATS, the letterhead showing a New York City address. Walston foresaw modified operations, and encouraged readers to apply for employment in the experienced and qualified work force to be needed. His letter set an underlined application deadline of Monday, August 2, beyond which ATS would assume a person did not want consideration for employment. Applications were to be obtainable in the human resources office, and the written offers to follow after an actual determination of personnel needs would set forth new terms and conditions of employment at ATS.

In late July, Human Resources Director for CVG Enterprises Kristi Kleckner placed identical ''positions available'' advertisements in the trade publications Hollywood Reporter and Daily Variety. These box ads stated that applications would be accepted for technical and support classifications in

¹ All dates and named months are in 1993, unless indicated otherwise.

a "New state of the art video services company" under formation, and pending the acquisition of CVG Company's assets. Walston's letter to employees had referred to the placement of these ads, but not that existing employees should construe them as a rebuff.

The acquisition involved numerous documents of great detail and complexity. These dealt with all manner of legal and financial subjects, and included recitals, commitments, and formal opinions of status. In section 9.3 of a "Contribution Agreement" relative to the transaction, the proposed acquiring entity agreed to offer employment to all active employees of the acquiree, but with offers carrying wage levels and other conditions of employment which the acquirer "shall in its sole discretion deem appropriate." Section 8.18 of a "Loan and Security Agreement" between ATS and the principal secured creditor contained recitations as to collective-bargaining agreements and labor organizations, with an associated schedule, section 8.18 included the following entries:

- A.) The borrower will be a signator to the IATSE Basic Agreement for it's [sic] film sound employees.
- D.) The current in-house IATSE Local 695 agreement is not included as part of the acquisition. A majority of current employees will be hired by ATS under new rules and conditions. The Company will be required to bargain with the union which could result in a work stoppage.

ATS followed through with the hiring of practically all former employees of the CVG entities. This accounted for at least 90 percent of its original and ongoing work force. In a few cases employment was not offered to certain individuals, while others declined for their own reasons. A few new rank-and-file employees were hired into the operation, the number of whom was estimated as less than a dozen.

The document constituting establishment of a new employment relationship was a one-page sheet from ATS dated August 3, which offered employment conditional on the anticipated sale. This document had a business letterhead address of 2820 Olive Avenue, Burbank, where CVG corporate and human relations offices had been located. The sheet was also conditioned on acceptance, a deadline in this regard being given as August 4, beyond which ATS would deem the offer to have been voluntarily declined. The document had space at the bottom for a one-sentence acceptance to be signed, and each offer was tailored by entry of a particular employee's name, job title, hourly rate to be paid by ATS, and described vacation benefit.

Generally, the more skilled and specialized occupations retained the hourly rates being paid by CVS. This outcome applied with sound mixers in the \$40–50 hourly rate range, editors ranging variously from \$32 per hour to several much higher, and colorists (telecine) who held their approximate \$50 per hour rate so far as is known. In contrast, various less skilled occupations such as recordist, Chyron (electronic graphics operator), general tape operators, tape operators playback, TVN (Touchtone Video Network) tape operators, satellite and vault (librarian) employees were reduced in wages. Most of the reductions were in a range of 25–30 percent less salary, with many of those who quit rather than ac-

cept an offer of lower paying employment with ATS being in this group except for higher earning editor Mike Sachs.

ATS did not uniformly enforce its stated deadlines for employees to apply or render their job acceptances. This was occasioned at least by instances of persons on vacation, where an acceptance deadline was extended to August 8. Generally, however, ATS intended to continue business activity as uninterruptedly as possible, and to imprint its own ideas of organization, operational efficiency, and broadened sales effort as time passed.

4. The bargaining demand

Publication of the "positions available" ads in trade journals had been promptly reported through union channels to Leslie Blanchard, area international representative of IATSE. By letter dated July 29 Blanchard wrote to Donlon, prefacing that it had come to his attention the "Compact Video assets are being acquired by an unknown entity." Blanchard asked for confirmation whether such a transaction was contemplated and, if so, he itemized several requests for information as it might affect job security of employees. He closed the letter with a demand for bargaining over any decision to divest assets, and over the effects of such a transaction on bargaining unit employees. Although a response by the next business day was requested, Blanchard's letter went unanswered.

On August 6 Union Attorney Ira Gottlieb wrote to Employer Attorney Richard Kopenhefer, primarily in regard to the Union's concern with matters involving CVS.² Attorney Gottlieb's letter also touched on several uncertainties as to the emerged ATS entity, and he embodied an associated demand for recognition and bargaining between ATS and IATSE. Attorney Gottlieb's letter was answered by Attorney Kopenhefer on August 17. This letter of reply made clear for the first time that Attorney Kopenhefer represented ATS, and declined the recognition request on principal grounds of "administrative, operational and other changes already made and/or anticipated by ATS." The reasons so advanced were continued with Attorney Kopenhefer's conclusion that ATS was not a successor employer because the Union was not willing to acknowledge a single, companywide unit as the only appropriate one. Attorney Gottlieb immediately replied by letter also dated August 17, in which extended dispute was taken with the Employer's position and a demand for recognition from ATS was reiterated.

5. Postacquisition matters

During the first full weeks of operations by ATS, Walston met with assembled employees to introduce himself and discuss future plans. On August 18 Walston issued a memorandum to all ATS employees labeled "IATSE recognition," referring to his meeting with employees of the week before in terms of his strong belief that ATS was one indivisibly consolidated company. The memorandum advocated one companywide bargaining unit, as to which all employees should

² The Union's brief in this matter advised that its charge against CVS as filed in August resulted in an administrative law judge's decision in January 1995. This decision found violations of Sec. 8(a)(5) of the Act, to which CVS as the respondent employer has filed exceptions, and that Case 31–CA–20104 is before the Board for ruling.

have a right to vote on representation. The memorandum also advised how the NLRB had been asked to conduct such an election, this reference being to an RM petition in fact filed that day for an approximately 250 employees.

In a related development ATS continued to apply the separate Meridian contract to employees of that entity. The reason for this was to continue "the ease of administering the terms and conditions of employment" permitted by IATSE's basic agreement, and because of the employer's view that the Meridian business was of a type "substantially different" than the balance of the enterprise. Furthermore, the Meridian employees had been canvassed as to their wishes in the matter, and from this executive management of ATS learned of their influencing desire to remain under that collective-bargaining agreement.

As a highly tangible change, the former corporate headquarters at 2820 Olive Avenue was selected for renovation into a technical center to provide unified and companywide functioning. Preliminary construction was started by late August, and continued progressively until the first move of operating employees could be made beginning in the period of January–February 1994. The main business office of ATS was relocated to a sketchily mentioned 303 Orange address. Respondent renamed itself Four Media Company (4MC) around January 1994, as a matter of optimum business identity for Walston's objective of attaining a consolidated image within the user industry as an enterprise that could effectively provide (1) sound, (2) data, (3) video, and (4) film elements with quality postproduction services.

C. Testimony

1. Larry Barr testified that he was first employed by the enterprise in 1980, and by August was an audio recordist working at 2901 Alameda Avenue under the supervision of Kim Austin. His duties were to generate a 24-track format for a master videotape by accomplishing sound lay-down and lay-back. Barr was familiar with other occupations of the enterprise, such as telecine colorists who performed scene-toscene color correction and transfer of film to videotape, maintenance engineers who repaired and installed equipment, Chyron operators titled electronic graphics operators who entered picture credits, videotape operators who loaded and ran videotape machines, editors who assembled videotaped shows and tape operators who assisted the editing process. Barr identified film loaders, magnetic machine operators, and sound mixers employed distinctly in the first floor operations of Meridian at 2901 Alameda Avenue, and the dub room operators engaged at duplicating work in the basement of that building. A chief difference in the sound work done at Meridian is that its personnel deal with film, in contrast to what was done with videotape by Barr and his colleagues at CVS. He also described the duties of vault personnel as a librarylike storage and retrieval function for issuance of film or videotape used in sessions at edit bays or studios.

Barr performed his job as directed by work order, a document identifying business customers, as, for example, Universal Studios, Columbia Pictures, Warner Bros., Castle Rock, Lorimar, Wind Dancer, or Disney. He saw no change in clientele as comparing preacquisition business to what was done as ATS while early in its operations. The 7 to 10 persons acting as first-line superiors to the technical personnel also remained the same, work locations at the premises for

the most part remained the same, and existing equipment was used just as before. An occasional change of job location reflected some increase in the frequency of employees being asked to step into other job functions. Barr used as examples that tape operators or editors might perform Chyron work during their shift, or in his own case that he might train other persons in addition to accomplishing his own work. He testified that such departures from an employee's regular work could be requested by scheduling personnel, and often reflected seasonally busy scheduling periods of the Company.

Barr displayed his familiarity with Image Transform operations as based on several dozen instances of being at that facility over the years. He knew of their principal film to tape transfer capability using telecine colorists, tape operators, engineers, and vault personnel in a manner he termed "identical" to functions at the Alameda Avenue buildings of CVS. He also confirmed that drivers from Image Transform appeared daily at the Alameda Avenue premises bringing videotape and other materials for processing and returning to Image Transform with finished work.

Barr knew of Disney channel operations as performed on the fourth floor at 2901 as "Alameda Broadcasting," and he has performed sound work for their shows as well as occasionally going to that level of the building where he sees Disney origination work being done by videotape operators, satellite engineers, and transmission engineers. He is also aware that other satellite clients are similarly served by Respondent's own unionized origination employees, other than for "nuances and variances to any job." These individuals hold the same classifications as persons working on Disney channel production. Such other clients include TVN and the Playboy channel, with origination in these instances occurring at a "bunker" site of 2813 Alameda Avenue or in the basement of 2901 building, where all satellite signals are routed for transmission.

2. Glen Deschryver was first employed by CVS in 1985 for telecine work of film transfer and color correction to PAL and NTSC formats. By 1993, however, he was in fact assigned to duplicating commercials, shows and feature films in the basement dub room operation at 2901 Alameda. He was a shop steward, and working day shift at the time. Deschryver saw no change in the nature of his work, the location at which it was performed, the equipment to be used, the customers served nor the supervision exercised, all in comparing preacquisition activity to that done as ATS in the several months following its advent. However, Deschryver also testified that shortly after the acquisition newly appointed Dubbing Manager Don Buhr participated in issuance of a disciplinary suspension against him in October. This was construed as a second offense, if a bad dub he had produced while with CVS the previous July was taken into account.

Deschryver was aware of new individuals brought on to oversee future operations on an executive level. He testified to sensing some increase in the interchange of persons with Image Transform, and an even more pronounced shift as re-

³ Stipulations were entered into the record that (1) ''[P]rior to August 5, 1993, employees performing satellite origination services for The Disney Channel customer were excluded from the bargaining unit by the parties,'' and that (2) ''employees performing satellite origination services for customers other than The Disney Channel . . . were included prior to August 5 in the unit set forth in General Counsel's complaint.''

specting Alameda Broadcasting where by October or November editors from that floor were learning the CVS system while CVS editors of the bargaining unit in turn went upstairs to adjust equipment and assist in promotional features. These latter exchanges were fixed as occurring subsequent to early October and included both brief, temporary 1- to 2-day assignments, as well as the move of dubbing employee Tony Distel who, insofar as Deschryver knew, has been permanently changed to an Image Transform assignment. Deschryver recalled a meeting of employees conducted by Walston for introduction purposes. Walston had given a general overview of the "new path" he intended for the enterprise to follow. One objective was to obtain higher paying clients, and another was creation of "a high-tech" dub room. Walston foresaw closing of Image Transform at its Lankershim Boulevard location, and moving those functions to Olive Avenue after renovations then underway were finished. In summarizing testimony upon being recalled, Deschryver asserted that only a few CVS employees declined employment with ATS or stayed only a short time. He is also the source of evidence that the number of new hires made by ATS into bargaining unit type work was "under a dozen.'

3. Martin Hernandez was first employed by CVS in 1989 as a video maintenance engineer. He was continuing in this work by August, with duties of maintaining postproduction equipment and assisting in the solution of technical problems encountered by editors. Hernandez' immediate supervisor was Chief Engineer Ron Bailey, and his work location was at 2813 Alameda Avenue. He added the names of Buena Vista Entertainment and Prism Entertainment as among the clients formerly served by CVS. As with most others Hernandez had accepted the ATS employment offer, and continued in a job seemingly without any practical change. His observation of other CVS employees was that they, too, continued performing their work as done before the acquisition, including that they kept normal locations, used the same equipment, served the same customers, and had the same supervisors.

In his career at CVS Hernandez never crossed over for work at Image Transform, and did so as to Meridian only about four times to activate malfunctioning playback machines. In this process he assisted Peter Orekinto, Meridian's regular staff engineer. Hernandez was professionally acquainted with several of the "Alameda Broadcasting Group" engineers working at the Disney origination center. He also testified to assisting that fourth floor activity in trouble-shooting a tape machine problem on a couple occasions as assigned by his own engineering supervisor.

Hernandez voluntarily left Respondent's employment in December, and had not up to that point engaged in any postacquisition interchange work at Meridian. To Hernandez' awareness the name "4MC" had not come into existence by the time he left.

4. Michael Perry was first employed by CVS in 1985 as a telecine colorist, and accepted the offer of ATS to continue in this work after the acquisition. Perry testified that his job was also functionally called film transfer technician, and involved creation of an electronic image of motion picture film which is then transferred onto videotape. He had worked at 2813 Alameda under Steve Drinkwater's direct supervision, and continued with ATS at that location with the same

equipment, supervision and generally no change of duties. This had included past telecine processing of film to tape format for both Image Lab and Disney channel operations. Perry expressly explained that employees known as schedulers also fulfill the function of being a customer service person. For 5 months of ATS employment until his layoff in early January 1994 Perry observed no change in the duties of employees around him, or the clients who brought products to the operation.

5. Suzan Tintorri was first employed by the CVG predecessor in 1979, and has progressively performed vault work, Chyron machine and videotape operations. She had carried out the last two functions concurrently for about five years preceding the acquisition. Over these 5 years the relationship of such mutual duties changed. At the end, her work was about 80 percent videotape operation. The Chyron operation was done progressively more by employee Mark Leiss, who became regularly assigned to this work by 1993. Her direct supervisor was Steve Drinkwater or Mike Vincent, depending on the shift she was working. She could be in either of the Alameda Avenue buildings as dependent on particular work, and to make contact with her supervisor, company schedulers, or to deposit paperwork. Tintorri described videotape operating as assistance to editors, color correction and the making of dubs. Her view of Chyron machine work was the utilization of specially designed equipment to compose text and enter film credits. She was aware of the customer at any given time from scheduling information, if not from the actual work orders.

Tintorri accepted an ATS offer in continuation of just what she had been doing, and without any change in job location, duties, equipment or supervision She testified to not actively responding to the invitation for CVS employees to make application with ATS. Her exactness on this point was that the offer of employment in letter form dated August 3 preempted any need for a traditional jobseeking by the person themselves, and in her view constituted "the application, as it were." She was acquainted with 90–95 percent of the CVS employees, and observed this group of an estimated 60 persons after ATS took over. As in her own case she saw no change in what the group carried out.

In her past employment with CVS she had performed work for Meridian, such as entering a time-code visible in a show picture and generally assisting in editing sessions. Her contact with the Disney operation was more limited, such as retrieval of what had been a shared tape or common edit source and Chyron work. She recalled the building of edit bays for Disney by CVS engineers as being done several years ago. Tintorri had never traveled to the Image Transform location, but knew of daily deliveries by their trucks and that she may have performed work on videotape after its processing at the Lankershim site. Tintorri also had familiarity with functions at Chestnut Street and Image Lab. In the former case she said their rank-and-file performed shipping and recotech work, and the latter operation was film development, color correction, editing and splicing. Tintorri knew Human Resources Director Kleckner, and saw that she continued in the same position for ATS by postacquisition consultations with her. Tintorri was laid off in January 1994, but has continued with occasional work for Respondent as an oncall, free-lance person.

6. Blanchard testified that he has held his IATSE position since 1992. He participated in negotiations for the current inhouse agreement that had covered CVS employees. Blanchard clarified that notwithstanding a convenience entry used by dominant IATSE Local 695, the in-house agreement was strictly between the employer and international union as parties. He testified concerning the wage schedule, a place at which the full scope of the covered bargaining unit may be discerned by the presence of classifications not listed in "trade jurisdiction." Blanchard pointed out that a two-tiered system of wages was in use, which to his knowledge may or may not have included "grandfather[ing]" benefits for longer service employees.

Blanchard was aware that employees of Meridian were covered under a separate collective-bargaining agreement. He authenticated the "Agreement of Consent" signed by Donlon in late 1989 on behalf of Meridian and as its president, in which that entity recognized IATSE and adopted the then-effective 1988 basic agreement of the industry. The agreement in effect when Meridian bound itself to recognition of the Union was succeeded by a 3-year basic agreement of 1990. Certain recitations were made at the introductory portion of this collective-bargaining agreement, including one in which IATSE identified its 23 local unions of the West Coast industry. Local 695 (and related 695 locals) were named, with the associated functional description being composed of "International sound technicians, cinetechnicians, telecine engineers, station projectionists and video projection engineers." The purpose of this recitation was to emphasize that the basic agreement was entered into so that it "may inure to the benefit of the members" of the named West Coast locals. Blanchard testified to his understanding that ATS had accepted and complied with this "basic" Meridian agreement. The form of such action was a letter dated September 1 from Attorney Kopenhefer to Union Attorney Gottlieb. As Blanchard knew to be the case, the Meridian contract was subsequently extended to December 3.

Blanchard also authenticated a "General Memorandum of Agreement," which was distributed to members of the Union's West Coast studio locals. This was prefaced by a cover letter dated January 17, 1994 from IATSE's international president, and described a settlement reached on December 29 for a new 3-year basic agreement extending into mid-1996. It was subsequently to be reduced into "formal contract language," and to ratification by union members. These conditions were apparently fulfilled from the significance of Blanchard's further testimony that the new agreement "is now" in effect and covering the employees of Meridian.

Blanchard testified that in the past the Union had "[given consideration]" to organizing employees of Alameda Broadcasting, as this operation existed on the 2901 fourth floor constituting the Disney channel. He conceded that the fourth floor work at the Disney channel "can be" jurisdictionally identified with IATSE. Blanchard added upon questioning that tape operators and engineers engaged in Disney channel activity were performing work within language of the CVS in-house agreement as to scope of the bargaining unit.

Blanchard recalled that in late 1993 the Union had placed flyers at the Lankershim Boulevard, premises for Image Transform employees to attend an informational meeting. He denied, however, that this constituted an attempt at the time to organize such employees. Blanchard responded to questioning about whether telecine work, standards transfer work, or tape duplication work as performed at Lankershim Boulevard was within IATSE's settled trade jurisdiction. He denied this to be the case, but couched the reason for his denial as being that Image Transform had no collective-bargaining agreement with the Union. Blanchard's answer was essentially the same when questioned about tape vault work, shipping and receiving, or tape cleaning and evaluation as performed at the Chestnut Street facility of the enterprise. He was unable to say whether IATSE had at any past time "attempted to organize" Chestnut Street employees.

7. Walston testified extensively as to planning of the acquisition, details of its financing, and pertinent content from the voluminous documentation involved in the transaction. Basically such facts are set forth above, in another portion of this decision, and for that reason a description of Walston's testimony will focus essentially on his postacquisition planning and operational implementations as Respondent's chief executive officer.

He gave a concise statement of why Respondent applied the Meridian agreement to film sound operations. His explanation was that this small group of people had expressed their desire for such coverage, and that the applicability of IATSE's basic agreement provided a greater ease of administering terms and conditions of employment for this particular film sound business. As to the CVS in-house agreement, Walston testified directly that Respondent was not applying or adhering to it, and that in fact he had never personally seen this agreement. He testified to a view that after acquisition all employees of the enterprise were looked upon as "one company . . . managed together under one management structure." Enlarging on this view Walston testified that CVS did not reflect the "separate and distinct" character of the Meridian business, and for that reason there was no "definable group [with] particular desires" as to warrant a canvassing of CVS employees as was done at Meridian.

Walston testified to the importance of Respondent having its business plan in place prior to the acquisition, and that implementation of changes began immediately. The fundamental components of this business plan were a consolidation of operations, an elimination of job duplication by integrating similar functions, and a commitment of capital investment, all with the objective of reducing cost and increasing operating efficiency. He believed the most significant change was his own presence as the controlling executive of the enterprise in most dramatically changing the style of how it was run when compared to previous management. He twice alluded to there being "no relevance" to narrow or segmented groups within the enterprise, and how the meaningfully needed changes were in terms of unification for efficiency sake and business success. Walston also often alluded to the "massive" changes, as being descriptive of what was soon brought into place as to consolidation and technological modernization. He testified that physical changes and construction began immediately upon the acquisition, and was concluded in stages that spanned from January to November 1994. A major phase of the changes involved closing of Image Transform on Lankershim Boulevard, and relocation of its facilities and personnel also in stages from early to late

When first questioned by his own counsel at the start of Respondent's case in chief, Walston described his duties as to oversee and evaluate all operations of the Company, maintain its capital structure, determine and implement all employee relations plans, and provide complete operational control of every business aspect including marketing. Walston began holding meetings with the many former employees of CVS, with the first two of these occurring within 10 days of the transaction. He emphasized from the beginning as a primary message that the previous four styles of operating would be disdained, and these "four mentalities" would evolve into one overall and overriding style of operating. He described to employees that they would all work under the same terms and conditions, new wage rates, a new handbook and new benefits. In his second meeting, held at 2820 Olive Avenue, he explained that this former corporate office was already in the stage of being reconstructed into a new and consolidated technical center.

Walston testified that his objective was to create profit centers under middle management control, with both accountability and responsibility for decisions at that level. He envisioned telecine, duplication, sound services, the satellite function, engineering and the laboratory all under specific management, as contrasted with near-complete decision-making authority having previously reposed in Donlon.

Walston testified concerning a series of individuals who composed the new management structure following the acquisition. Rob Hause had managed satellite services for CVS. Respondent integrated all satellite operations after the acquisition, effectively seeking a consolidation of supervision and objective with both satellite services as "unionized" under CVS and the "non-union operation" of Alameda Broadcasting. According to Walston he installed Hause as the new director of this combined group beginning only a couple of weeks after the transaction.

Walston also testified that Terry Robinson had been manager of telecine and duplication at Image Transform, and was redesignated vice president and director of technical services for ATS. This was the major consolidation to be brought under one roof at 2820 Olive Avenue, and to include all the professional duplication operations, standards conversion function, telecine operating, tape to film operations and vault services.

Robinson assumed this position following an interim period when the technical services concept was directed by Gavin Schutz. He had formerly been in charge of engineering for Image Transform. In turn upon Robinson's assumption of her new position, Schutz became a nonvoting company director and the director of consolidated engineering operations, eventually as Respondent's chief operating officer. With Schutz as director Respondent began using its engineering staff more interchangeably, the process aided in part by a new centralized computer system permitting communication among company areas as to drawings and schematics.

The film and tape sound departments that formerly operated separately were consolidated under the management of Terry Auerbach. She had been the general manager of CVS, in a position that was termed overall "postproduction." Walston considered that term to have "no relevance" to his intended changes. However the film and tape sound depart-

ments continued to be headed by Wayne Gordon (as "director") and Kim Austin (as "manager"), respectively.

Other individuals were also brought in from outside the company to head its various operating groups as envisaged for them to function. Jan Yarbrough came from outside the company to first manage editing and creative services on a temporary basis. Yarbrough started with the company on August 30, and stayed an estimated 9–10 months during which time he served as chief operating officer. Walston testified that Larry Levin was then employed to succeed Yarbrough as creative services director in early 1994. Buhr, referred to above, and Larry Bates were also brought in at the behest of Walston, to be responsible for dubbing room relocation and specialty dubbing operations, respectively.

Walston testified that vault operations were in the process of relocation to a newly leased and consolidated facility on North Hollywood Way, a change that was yet to be made pending completion of new construction. He confirmed the total capital investment amount since acquisition as approximately \$19 million, this cash having been provided by the Steinhardt organization. The expenditure was principally made on creation of the technical center and related move of previously scattered operations, the change from an analog to a digital environment, and acquisition of a Santa Monica company as well as expansion into Asia. Walston testified that the charts showing Respondent's new operational structures were entered into a computer of the first day of ATS' existence, and that they have been amended constantly since that time. As to the conceptual plans for future operating methods, none of them had been reduced to writing.

Walston testified that the language of document schedule 8.18, reciting that the Company would be required to bargain with the Union, was merely a routine entry in a loan document to avoid undue concerns that the lender might otherwise raise. In response to the direct question, Walston testified that ATS did not actually have such an intention at the time of signing this document.

Walston identified certain exhibits introduced by the General Counsel as early or tentative versions of organizational structure and proposed dispersal of various employees or employee classifications that would fulfill his objectives of a new and more effective business organization. He recalled a comprehensive one as projected from a transparency during one of the initial employee meetings, and that with minor modifications it was a fair depiction of operations in place when he testified in January 1995.

In reference to certain of the evolving organizational charts, Walston testified that he created a management information systems department to consolidate control and accounting functions. He termed this change a streamlining and standardization of billing procedures, and a clear simplification of the scattered billing practices of the CVG entities. In the marketing area Walston disbanded the former sales department and housed a sales function in each profit center to be accountable to the manager of that profit center. Bob Bailey was appointed as the marketing director, with responsibility to orient sales personnel in all products and services of the Company, as well as insuring that they practiced cross-selling to maximize business opportunities. Bailey had assumed his position during an estimated time span of September to November.

Walston summarized his view of operating changes with comment about the newly named departments. Technical services was the consolidation of functions formerly carried out by CVS and Image Transform. Editing became a new form of organization without comparison to what had existed before. The new engineering department represented a radical change in that all engineers were now to report to a single person overseeing this complete function. As to satellite operations Hause was in Walston's view moved more slowly into his new position to compensate for insufficient experience. This grooming process left Hause dependent on the day-to-day guidance of Donlon as Hause grew into full capability of eventually running all consolidated satellite operations

8. To the extent of happenings after the acquisition, Donlon testified to examples of contact in the syndication distribution business that might occur between unionized employees at Alameda Avenue and those working at the Chestnut Street facility. This occurred when Chestnut Street needed additional dubs to fulfill shipping instructions, or conversely when Alameda Avenue might need recotech capacity to be used for replenishment of various sizes of tape stock used in duplicating. Donlon described how a particularly urgent delivery of a dub for syndication might be necessary, in which case Alameda Avenue personnel would rush the item directly from that location instead of its usual shipment from Chestnut Street. Instances such as this are coordinated by customer service personnel who keep both locations informed of needs. These customer service personnel also seek to maximize satellite capacities. In the course of this the satellite operators at Alameda Avenue might affect the interrelationship of operations with Chestnut Street. By the time of the August transaction the amount of satellite-transmitted syndication work had grown to about 50 percent of the total, and this was destined only to increase as the technology developed further. Donlon also affirmed that following the August acquisition the engineering employees formerly with CVS continued to provide services to Alameda Broadcasting (Disney) as was done before. As to other postacquisition matters Donlon testified that all Lankershim Boulevard, work of Image Transform has been relocated to the new Olive Avenue technical center. Further, the telecine and professional duplication work formerly done at Alameda Avenue has been similarly relocated.

Donlon testified on the basis of several exhibits that permitted a description of operations done on each level of the 2813 and 2901 Alameda buildings. The exhibits labeled the various functions, and Donlon enlarged on this labeling as well as commenting on changes or prior uses. His testimony was essentially in harmony with descriptions given by other witnesses as to floor by floor utilization of the Alameda Avenue facilities. These descriptions covered the Disney operations, editing both by unionized and nonunion employees, vault facilities, satellite and syndication scheduling, tape mixing, and sound editing studio, the film sound operations of the first floor of 2901 (Meridian), the basement satellite, tape operations, playback facility, and the engineering offices.

Donlon also interpreted a depiction of the new technical center on Olive Avenue, where currently about 50 employees work in consolidated telecine bays, a large duplication capacity, with standards conversion equipment, quality control and video sweetening, at the main electrical router and in a front

area where a vault is located, shipping, and receiving operations are performed, scheduling, and customer service is now housed, and nearby there are engineering offices and a shop. Donlon testified that the personnel comprising the technical center work force came from Lankershim Boulevard as well as the 2813 and 2901 Alameda locations. He fixed January 1994 as the time this move began, and following a gradual process that it was completed by May 1994.

Donlon testified that his involvement in preacquisition dealings gave him a reasonable expectation to believe that most employees of the CVG entities would be hired by ATS. He did not, however, know whether the acquiring interests were planning to continue the in-house IATSE agreement that had covered many CVS employees. Donlon had learned from personal contact with individual employees of Meridian that the group favored continuation of their own union contract. He did not recall communicating this knowledge to Walston, but did participate in the decision to continue the Meridian agreement after the acquisition. He also participated in the decision to not continue the CVS agreement with IATSE, but did not do so based on any determination of employee wishes. Donlon added that his own office as of early 1995 was on the third floor of 2901 Alameda location, from which he engaged in corporatewide activities.

D. Credibility

The several witnesses called by the General Counsel were generally credible in their testimony. I was particularly impressed with Barr, Hernandez, and Tintorri, each of whom gave persuasive descriptions of postacquisition operations and the only slight changes that took place in the first several months of ATS' management. Witnesses Deschryver and Perry were less persuasive in the sense that they displayed more subjective and less acute memories of business operations around them following the transaction, and the particular manner in which personnel were affected by the change. The testimony of Blanchard was not as enlightening as would be expected, and my sense as to him was that he had little direct knowledge of operational events, nor for that matter even the practical realities of the collective-bargaining agreements in effect with his organization. In general the fully credited testimony of Barr, Hernandez, and Tintorri provides an excellent evidentiary basis for fact-finding in regard to the major work functions of tape sound, engineering and videotape operation during the balance of 1993 following the August takeover. Further, these witnesses provided credible testimony as to other principal occupations, and the interrelating between work groups in the several facilities of the enterprise.

Respondent's witnesses were confined to the key executives. The extensive testimony of Walston does not lend itself well to a traditional credibility assessment. My sense of his knowledge is that he envisioned abrupt operational changes to correspond with new business plans, but that he had insufficient direct or keen observation to make his testimony useful. Walston had more a belief in the soundness of consolidating changes, as contrasted with being truly aware of whether his vision was fast becoming a reality. It is therefore less a matter of Walston not being truthful, than it is of him not being well informed. Either way the effect is the same; his testimony had little value to the chief successorship and unit issues of the case.

However, there were other frailties to Walston's testimony. He tended to be evasive when questioned closely about possible contradictions between intent of the acquisition and its fulfillment. This was manifested, for example, in his crossexamination as to the schedule 8.18 language of the loan agreement. Walston also tended to exaggerate the importance of planned changes, as with his frequently used term "massive" to characterize change-driven events that were more in his mind than taking place in actuality. He identified "crosstraining" of master control operators as an attempt at skill improvement, but had not monitored its success and had no idea as to when it might even have begun. Finally, his testimony was often at odds with rank-and-file witnesses who I have found to be credible. For instance his own portrayal of new coordinating efforts among company engineers did not square with the more believable testimony of Hernandez. In summation I find Walston's testimony acceptable as to general context, but do not credit him with respect to operational details of the business during at least several months following the acquisition.

The situation with Donlon is quite the opposite. I found him to be candid, of good general recollection, and precise in his description of past industry factors as well as overall changes brought on by ATS as the rescuing takeover entity of the former CVG enterprise. However, his testimony focused on former operations, as well as resultant change after nearly 1-1/2 years had passed from the time of acquisition. Donlon was not drawn on to testify in a manner that would contradict the credibly observant witnesses of the General Counsel. For this reason he provided Respondent with little support in its resistance to the successorship allegation of the case, or the unit issue if this is to be resolved by an analysis of immediate postacquisition matters. My summarizing conclusion as to Donlon is that he was a credible witness of truthful intention, but in a way different from Walston one resulting in very little of evidentiary value to Respondent.

E. Discussion

1. Successorship

As a case of fundamental significance, *Burns* remains the recognized starting point for treatment of successorship cases. The successorship terminology applicable to this proceeding flows from operative words of the complaint, in which it is alleged that Respondent took over a former enterprise and "continued to operate the business . . . in basically unchanged form" while employing "a majority of [the former] employees."

The Board has held recently that if allegations of this import are found to be true Burns is a valid source of precedent. In *Task Force Security & Investigations*, 312 NLRB 412 (1993), the Board cited *Burns* in holding that when a respondent "continued to operate the [former] business in basically unchanged form and has employed a majority of [former] employees" this would constitute it a successor under the Act.

A necessary case to couple with discussion of successorship theory is *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). *Fall River* is cited in support of the long settled principle that an employer succeeds to the collective-bargaining obligation of another employer upon hiring a majority of the predecessor's employees and maintaining such

similarity of operations as to manifest a "substantial continuity" between the two companies. *Fall River*, supra at 43, summarized the factors to be examined for the substantial continuity test as follows:

Whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and has basically the same body of customers.

The court further instructed that these characteristics of the substantial continuity factor were to be assessed primarily from the perspective of the involved employees. Quoting from *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973), the *Fall River* opinion noted that when an acquisition of assets and continuing a predecessor's business operations without interruption or substantial change occurs, the retained employees will understandably view their job situations as essentially unaltered.

In Food & Commercial Workers v. NLRB, 768 F.2d 1463 (D.C. Cir. 1985), that court clearly impressed that the essential inquiry was "whether operations as they impinge on union members, remain essentially the same after the transfer of ownership." Food & Commercial Workers, supra at 1470. This rationale followed closely in time to another Circuit Court quoting that in successorship determinations "the touchstone remains whether there was an 'essential change [in the business] that would have affected employee attitudes toward representation." (Emphasis addded). NLRB v. Jeffries Lithograph Co., 752 F. 2d 459, 464 (9th Cir. 1985). In the further approving statement of rationale, the Food & Commercial Workers court wrote that "The focus of the analysis, in other words, is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect members of the relevant bargaining unit." (Emphasis added.) Food & Commercial Workers, supra at 1470. The Board subsequently overruled its underlying decision in the Food & Commercial Workers proceeding, to the extent it had been inconsistent with the court's opinion and related denial of enforcement. See Sterling Processing Corp., 291 NLRB 208, 210 (1988).

The litigants are sharply divided with respect to how an analysis of the successorship issue should be based. The General Counsel and the Union both emphasize that the absence of even a 1-day break in ongoing business activity is the most prominent characteristic of the acquisition. Indeed both these parties point to a statement of record by Respondent's counsel that the transaction led to ''a fairly seamless transfer of employees [who] continued to perform same or similar services in a lot of respects.''

To the contrary Respondent has briefed this issue with a summary of the various changes that eventually occurred, and with a highlighting of the entity 4MC as evolved in name from ATS. By this approach Respondent argues that 4MC is a business of consolidated focus, in contrast to CVS as merely one entity under the spread of CVG. This emphasis is in my judgment a distinction without a difference, particularly when applicable case law dictates that the key factor

of substantial continuity in operations be treated from an employee viewpoint.

It is first significant that the transaction was structured with a pledge by the acquirer to recognize the Union as continuing collective-bargaining representative for employees of the CVS unit. While the operative language of this schedule (8.18, D.) provision did not commit Respondent to the current contract, the acknowledgment of a recognition obligation was expressly made and coupled with another stated expectation that a majority of current employees would be hired.

A second factor is the distribution of letters to all employees in very late July by both Donlon and Walston with information about a sale of company assets having been reached in principle. It is now known that the transaction actually teetered during the early eventful days of August, however this would not have been an awareness of rank-and-file recipients of these letters. What they knew, along with implications arising from the fact of trade publications advertisements having been placed, was contained in the plain language of both the Donlon and Walston notifications.

Donlon wrote more particularly about the unfortunate financial straits that mandated a sale of CVG. He foresaw the week of August 2 (a Monday) as an expected time the sale would close, and informed those receiving his communication that they would "no longer be employed by the Compact companies." This was followed by the following passages:

[M]any of you will receive employment offers from ATS Acquisition Corp. or its subsidiary companies. If you accept these offers, you will be employed by ATS Acquisition Corp. or its named subsidiary after the sale. I encourage each of you to apply for employment, as I have, with ATS Acquisition Corp. ATS Acquisition Corp. is actively considering its staffing needs and will be sending out offers of employment shortly.

This description of the immediate future, and particularly the intimation that ATS would comprise "subsidiary companies," made the transaction appear to have about as much a "seamless" character as would be possible from the individual employee standpoint. Of course, Donlon was not writing as an agent of Respondent at the time, however the expectation he created and his continuation as both a board of director member and ATS president permitted a reliance on what he had written in July.

Walston's notification differed from Donlon's in several regards. Although similarly addressed to the employees of "Compact, Image Transform [and] Meridian," Walston's memorandum had a more extensive discussion of future employment prospects. He foresaw the need for an experienced and qualified workforce, and although stating that final decisions as to personnel and staffing had not been made each recipient was nonetheless encouraged to apply for employment. Walston added that any job offer to be made by ATS would be on "new terms and conditions of employment." However, his memorandum closed as follows:

We have been advised that if a certain number of you are offered and accept employment, the union which represented you at the at the Compact companies may thereafter have the right to meet with ATS to discuss a new collective bargaining agreement. In that event, ATS will certainly satisfy all legal obligations with respect to union negotiations.

The offers of employment soon tendered by ATS, with the date of August 3 and expressly made subject to actual completion of the asset sale, referred to ATS' own "policies, work rules and other terms of employment," and disavowed "any agreement, policy or practice" that had existed at CVS as affecting new employment. Thus the setting of initial terms and conditions of employment by ATS was unmistakably done, but in a context of understandable expectation by the unionized employees of CVS that their collective representation would continue. While the words chosen by Walston in his closing paragraph of the July 30 memorandum had a sort of coyness, the normal interpretation of a "certain" number of union employees accepting employment with ATS would be that the 90 percent or more actually hired would lead the acquirer to extend recognition. I do not fault any unionized CVS employee for not harboring any legalistic reservations about Walston writing that their union "may" have a right to meet and negotiate, in contrast to the "shall" usage of mandatory meaning. That would place a strained and artificial meaning to opinions in both Fall River, supra and Food & Commercial Workers, supra as to understandable worker views of their job situations upon a successor's takeover, and their attitude toward both the need for and probability of continued representation. Finally, the Union's formal demand for recognition, as issued by letter dated August 6, was generated with utmost diligence in the circumstances.

I believe the correct disposition of the successorship issue is to be made in terms of conditions as they actually existed for the many weeks immediately following August 5. In Phoenix Pipe & Tube Co., 302 NLRB 122 (1991), the Board rejected a contention that transformation of job classifications and imposition of additional duties would defeat a finding of successorship when a representative complement of employees is in place for the commencement of operations, a union demand for recognition is pending, and the employees are performing essentially the same jobs as before. The Board also rejected matters concerning what the future might hold if all "cross-training" plans were carried out, finding that this projection was simply too speculative a basis to presume any significant change in employee attitudes about union representation at the time as of which successorship is to be determined. I take this to be a solid indication from the Board that where no hiatus in operations has occurred, as often the case in successorship litigation, the immediate realities of the new employer's business activity and employee utilization are to be looked at in the determination. It was clear that Respondent intended to employ practically all of CVS' former employees upon its commencement of operations. This was its commitment in transaction documents, Donlon expected the result, and Walston's memorandum of July 30, invited the prospect. Thus the obligation to bargain "accrued" on this takeover, and "subsequent actions may not dissolve that obligation to bargain." See Bellingham Frozen Foods v. NLRB, 626 F.2d 674, 680 (9th Cir. 1980).

Here, the credited evidence shows clearly that a substantial continuity from CVS to ATS occurred with regard to the represented employees. First the nature of the business was not only essentially but precisely the same. All data, sound, film

and tape work, this the heart of CVG entities combined postproduction services and the intended direction of ATS/4MC, continued without change from the inauguration August 5 date and beyond. Credible testimony of rank-and-file witnesses from a variety of classifications showed that with occasional slight enlargement of duties they continued for many weeks after the transaction in the same job and work surroundings as before, supervised in practically all instances by the same persons. The fact that upper management was replaced or shifted had little or no bearing on the smooth continuation in employment of those within the former unionized workforce of CVS. For this reason the elevation of Schutz over all engineering, the grooming of Hause for more responsibility, the hiring of Yarbrough and Levin, and the reassignment of Robinson and Auerbach are not facts that would appreciably affect a determination of the issue.

The numerous processes of the CVG enterprise that could be termed "production" remained as the essential activity carried over to ATS, and for the same customers as before. The General Counsel's witnesses both named the customers to whom continuing service was rendered, as well as recognizing the work order documents that would confirm these identities. In contrast Walston referred only as a vaguely generalized matter to an ultimate mix of customers that was more extensive than the array enjoyed by CVG, but he did not identify any significant new customer by name.

One branch of Walston's intricately delivered claims of how the two enterprises differed was in regard to sales technique. According to Walston, cross-selling was a new and more sophisticated approach he had introduced to the marketing efforts of ATS. However this description was rather completely undercut by Donlon's credibly presented explanation that sales personnel had always expanded on the subject of any sales contact, by inquiring whether other services of the CVG enterprise might be needed by the customer. When such was the case interchange and contact between staff of the entities would occur, in just the manner which Walston claimed was an ATS innovation.

I recognize that Respondent has committed millions of dollars for capital improvements and relocations, however these are changes that occurred only over the passage of many months. In Jeffries Lithograph Co., 265 NLRB 1499 (1982), a successor altered the locale of work to be performed by 1-1/2 blocks and implemented this change after 9 months of preparation. The Board found this change was of such a short distance and occurred so long after the acquisition of assets that it would not alter employee expectations regarding employment or working conditions. A proposed and actual increase in the number of employees performing the unit's work were also noted to be "not of such a magnitude" as to "alter employee expectations." Jeffries Lithograph, supra at 1504. See also Mondovi Foods Corp., 235 NLRB 1080 (1978), where the Board stated "[A] change in scale of operation must be extreme before it will alter a finding of successorship." I find from these overall circumstances, the validity of looking to the situation as it existed particularly in August, and by the authority of Fall River and related cases, that Respondent in a Burns successor to CVS as alleged. See also NLRB v. Marin Operating, Inc., 822 F.2d 890 (9th Cir. 1987); Blitz Maintenance, 297 NLRB 1005 (1990); Nephi Rubber Products Corp., 303 NLRB 151

(1991); Hydrolines, Inc., 305 NLRB 416 (1991); Commercial Forgings Co., 315 NLRB 162 (1994).

2. Unit

To have practical effect a finding of successorship must be coupled with the further showing that the bargaining unit at issue is an appropriate one under the Act. This requirement was embodied in the court's opinion in *Burns* where it wrote:

It would be a wholly different case if [the successor's] operational structure and practices [were so different that the existing] bargaining unit was no longer an appropriate one. [Burns, supra at 280.]

Respondent aptly points out the decision in *Irwin Industries*, 304 NLRB 78 (1991), one of the various holdings made subsequent to *Burns*, in which the Board stated that employees acquired from a predecessor "themselves must constitute an appropriate unit."

The Board has long held, however, that the Act does not require an evidently only, ultimate[ly] or most appropriate unit, but only that it be at least appropriate in nature. *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950). This principle was recently reaffirmed by the Board in *Vincent M. Ippolito, Inc.*, 313 NLRB 715, 717 (1994). It is also valid to rely on bargaining history, where that feature is long-existing because an employer has for many years dealt continuously with a union on that basis. *Children's Hospital*, 312 NLRB 920 (1993).

Respondent disputes the appropriateness of the CVS unit on broad grounds, including the vigorous argument that Section 9(c)(5) of the Act, prohibiting the extent of organization of the employees from being a controlling factor in a unit determination, must be applied here. I reject Respondent's contention insofar as how it is couched, because although not to be controlling the extent of organization may be one factor to be considered in a unit determination. *Vincent M. Ippolito*, supra.

Respondent also makes the threshold contention that the complaint is flawed, inasmuch as it pleads the appropriate unit in terms of an urban location that identifies only 2813 West Alameda Avenue as the place in which the bargaining unit is rooted. Respondent advances this contention by pointing to the literalism that results from a reading of the bargaining unit allegation as to a place of business. This literalism is that the 2901 Alameda Avenue location is not expressly identified. Respondent expands on its point by noting that even on a recognition that 2901 Alameda Avenue is involved, this location includes employees on both the first and fourth floors who have been regularly excluded from contractual coverage by the parties.

As with the point concerning extent of employee organization, I reject this contention, even though it does expose a discrepancy in fully accurate pleading. On only the second day of hearing the parties formulated a jurisdictional stipulation that included 2901 West Alameda Avenue as a place of business. This would have left only the grammatically singular phrasing of the unit allegation as an ambiguity, because it did not literally include the two Alameda Avenue street addresses. However, it was Respondent's counsel who read the stipulation into the record, and more importantly there was no contention made over the 11-month period required to

complete this hearing that Respondent was prejudiced in any way because of the oddity. Furthermore in the concluding days of trial Respondent entered into evidence depictions of both the 2813 and 2901 buildings, with floor-by-floor testimony from Donlon as to usage. Under these circumstances I disregard Respondent's unit contentions insofar as they are based on a claim of insufficient notice. On the contrary the exact nature of the claimed appropriate unit was a fully litigated matter in the overall course of trial.

On the direct issue of whether the CVS unit was an appropriate one, it is useful to look at the evolution of this business. Aside from its origination in the distant past, CVG (previously Compact Video, Inc.) was a focal point for the several changes described by Donlon. These changes left an enterprise fragmented by geography and departmentalized by both corporate structure and business objectives. The implication from Donlon's testimony is that CVG was never of the financial means to advance from its analog technology as the whole industry changed to digital mode, or to undertake the physical consolidations that were at least considered by its management in the past. As years went on it abandoned some business activity (RTS), terminated another by dissolution (Vidtronics), and unanticipatedly acquired a collateral operation to service by the best expedients available (Disney). Over this same course of years the parties uneventfully continued to contract for the same bargaining unit of Alameda Avenue employees as had long been the core of this business, and without either party making any significant proposal to vary its composition.

When a work distribution grievance arose in 1986 and resulted in unit clarification Case 31-UC-204, the Board was provided an opportunity to examine the historical unit in terms of an employer effort to keep it from being expanded to include any employees at the separate Chestnut Street location. *Compact Video Services*, 284 NLRB 117 (1987). The Board's decision on that unit clarification petition, while not a formal certification, was at least an act of legitimatizing the Alameda Avenue unit. This is the significance of the Board being drawn to term its holding as one relating to "the existing bargaining unit," and that the unit so clarified was one at Alameda Avenue that constituted a "unit of employees represented by the Union."

The upshot of this background is that a unit of settled recognition between the parties, and one that had existed over the course of several multi-year contracts, was present as a matter of mutual voluntary recognition. Considering the various tentacles of the CVG enterprise, the separated out Meridian film sound unit taking up the bulk of the #2901 first floor, and the preponderance of noninterchanging work performed by unionized employees at the Alameda Avenue buildings, the bargaining unit had a sufficient distinctness to cloak it with a bare appropriateness in terms of an expression of representational desires by employees. The acquisition of CVS occurred under circumstances that had strong leanings toward intended voluntary recognition of the Union, followed by a repudiation of this course for weak, insignificant reasons, and in the face of a prompt demand for continued recognition in the unit for which so little had changed. Furthermore there was no feature of the unit that constituted a repugnancy with the Act, or a peculiarity of major importance. Cf. Union Plaza Hotel & Casino, 296 NLRB 918 (1989).

I recognize that the unit was less than corporate-wide insofar as CVS was concerned, that its members shared facilities and work amenities with other employees, and that centralized administrative functions were carried out as to human resource services, payroll, purchasing and advertising by CVG on behalf of its constituent entities. While such factors tend to weaken any self-evident character of the CVS unit, the fundamental question is whether they destroy the notion of appropriateness.

I do not believe that is the case. General Counsel has shown the separateness of Meridian in the midst of CVS operations based on business reasons incident to the unpredictable nature of film sound work as clearly described in the testimony of Donlon. The comparable telecine and duplicating work performed by Image Transform is noted, however this historical distinction also had its reasons. The Company was long aspiring to attract a more desirable type of clientele by holding Image Transform out as a service of superior quality, and the interchangeability between CVS and Image Transform employees was minimal over the years. This outlook also contemplates that CVS engineers, the non-Disney ones that were deemed within the unit, had more opportunity to coordinate with others of that occupation. However Hernandez credibly testified that during his several years as a CVS engineer he never crossed over to Image Transform, and did so at the Alameda Avenue location of Meridian only about four times.

Anectodal evidence does not unsettle the bare appropriateness of the former CVS unit. According to Donlon, Ken Laski transferred out of the bargaining unit around June 1994 to a fourth floor (#2901) operation. Laski, as best can be known, had been a playback operator in the same department as Tintorri. To the extent that Respondent reallocated him to the historically nonunionized fourth floor, and identified him as a tape operator then to be part of the creative services department, these changes do not conflict with movement of employees as it would happen prior to the acquisition. It is known, for instance, that the assumption of technical support to the Disney channel resulted in some reassignments from CVG entities to the new staffing and services to be provided on the fourth floor. At earlier times in the Disney channel relationship permanent transfers in from CVS had been made, such as engineer "Alling" (or "Auling"), sinceresigned engineer Will Madden, both in 1992, and engineering supervisor Steve Schaefer. Thus a change such as with Laski was nothing more than ordinary reshuffling within a consolidated enterprise, and one having no significance to the unit question at issue.

Donlon also testified that during the first two weeks of August engineer James DeLuca transferred from "Alameda to Lankershim." The implication of DeLuca's change is that he was permanently moved, then later relocated when the Lankershim location of Image Transform closed. This was also, in fact, the assignment sequence of videotape operator Tony Distel. However the Board has explained that regarding unit issues a permanent transfer is a "less significant indication" of employee interchange then the frequency of temporary transfers. See *Red Lobster*, 300 NLRB 908, 911 (1990). Here it must be remembered too that the expositive Hernandez not only had never been to the Lankershim location, but was utterly unacquainted with a representative group of its engineers as their names were prompted to him.

It is clear that a bargaining unit of minimally sufficient appropriateness was in existence at CVS when ATS assumed control. It is also clear notwithstanding the extensive changes in location, diversified employee utilization, new business methods, and upper management changes envisioned by Walston, that actual conversion to what he intended took many months to achieve during which operations remained much of what they had long been before. The various organizational charts that were introduced are of limited significance. They reflected either a superficial showing of what ATS inherited, or the final form of Walston's hoped-for efficiencies of organization.

Walston's testimony as to these organizational charts is particularly vulnerable to the conclusion that they signify little of evidentiary value. In the sense of document authentication certain of these charts also lack any showing of a point in time to which they refer, as would give them better meaning to the unit issue. Some are dated during the latter months of 1993 and some are not. One of the undated charts is a highly generalized vision as to future operational structure, not including it should be noted the ultimately drawn creative services department. Walston was vague and uncertain as to most of the others. Among his representative answers were not knowing "in what context this was prepared," not thinking the purpose of another was "to even reflect specific organizational structure of this department," that long service and managerially diversified Steve Drinkwater was not actually represented insofar as the reality of "what he does," and a particular chart that "doesn't exactly reflect the reality of the situation." On this basis I have accepted the credible and detail-heavy testimony of certain witnesses of the General Counsel as to actual matters of work function, supervision, customer identity and product or service continuity, relegating the various organizational charts that were introduced into evidence to only background reference.

A principal focus of Respondent's defense is that the unit faced by the acquiring ATS should have been multifacility in geographical scope and consistent as to functional employee utilization at the Alameda Avenue buildings. In advancing this general contention Respondent's brief carefully discusses each facet of the claimed infirmity to the unit at issue.

After considering these arguments I disagree with Respondent's resultant conclusion. As to physically separate Image Transform, including its Image Lab operation, I do not believe the commonalties pointed to are sufficient to require that a multifacility unit was mandatory. Regardless of the fact that similar work was done at these separate locations as regards telecine and duplicating, plus that Image Lab accomplished all film development that the overall enterprise required, this does not create a strong community of interest between the employees that worked apart from one another. Neither does the fact that overflow work of Image Transform would be sent to Alameda Avenue for necessary processing, as this is merely a temporary and unforeseen expedient. As to employees at Chestnut Street Respondent has a view of the 1986 UC case which does not correspond to mine. While it is true that Towne Ford Sales, 270 NLRB 311 (1984), was influential in the Board's holding, an express finding was that Chestnut Street employees were not without their own separate group identity. The circumstances pointed to by Respondent as to the Meridian operation at the #2901 building

rest largely on the "side letter" in evidence as to the applicability of IATSE's basic agreement to the film sound work of the enterprise. However that side letter is only in evidence as to the 1992-1996 contract, whereas Meridian had executed and become bound to the entire basic agreement in 1989. Thus the separate Meridian unit had ripened during a several years period of contractual status. Respondent itself adopted this contract within a month of the acquisition, then even consented to its extension during a period of industry negotiations. I believe it is therefore a sterile argument to say that the situation with Meridian tends to support the larger contention about appropriateness of a multifacility unit. I do agree that the status at the Disney channel's fourth floor location in the #2901 building represents an oddity. The identical work on identical equipment that was carried out insofar as tape operations and editing were concerned creates some appeal to say that separating out this informally revered "Alameda Broadcasting" line of business was too great an insult to principles of unit appropriateness. However there is also a balance to this status, as Respondent found it upon the time of acquisition. CVS had only assumed the handling of Disney origination work little more than a year before. Further, the CVS employees serving Disney did not participate in actual transmission of programming, and while engineers attached to the Disney activity did routine equipment maintenance, any special work as with "heavy duty maintenance, broken equipment . . . " was done by unionized engineers of CVS. Respondent also speculates that the Union must have been influenced by a self-limiting "extent of organization" policy as to the Disney channel employees. There is not, however, evidence this was the case, and I believe the Union can be understood to have accepted the status quo at Disney because its new 4-year contract effective in 1992 had coincided with the changeover in how Disney was served. In this facet of the unit dispute, as with all others, I am also mindful that Disney employees were vividly seen as closely sharing common amenities, in this case even the parking lots, building accessways and employee lounges. However I am satisfied that the balance of factors referred to above, shows more dominantly that the settled, historical basis upon which this unit is defined are of more controlling force.

The ultimate change was a specific set of operational modifications that left much in place as it had been before, but only after the passage of nearly 1-1/2 years. Telecine colorists and tape operators of Image Transform completed a gradual move to the new technical center by late 1994. The duplication personnel of Image Lab also moved to the center in that time frame, and engineers were provided new facilities in this expensively renovated building. However the core of the CVS bargaining unit remained intact with tape operators at the basement and fourth floor (#2901) operations centers. This voluntarily created, oft-reinforced by successive contractual agreements, and once-reviewed collective-bargaining unit of post production personnel stationed at the Alameda Avenue locations was an appropriate one so as to warrant continuing recognition by ATS as a successor employer. This conclusion comports with the Board's recent reiteration of a long existing policy that it "will not disturb the recognition of an established bargaining unit unless required by the Act or compelling circumstances." Citisteel USA, 312 NLRB 815, 816 (1993).

CONCLUSIONS OF LAW

- 1. ATS Acquisition Corp. (ATS) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. International Alliance of Theatrical Stage Employees (IATSE) is a labor organization within the meaning of Section 2(5) of the Act.
- 3, All employees employed at Respondent's Burbank, California facilities as videotape machine operators, videotape editors, maintenance engineers, film transfer technicians, electronic graphics operators, computer personnel, fabrication, art and graphics departments members, boommen, audio two technicians, audio mixers, video projection technicians, telecine operators, recotech, tape cleaning, repair, evaluation and storage employees and all classifications set forth in the wage schedules of the collective-bargaining agreement effective August 1, 1992; excluding all other employees, guards and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
- 4. At times since at least August 1, 1981, IATSE has been the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act of the employees in the unit described above, and has been continuously recognized as such majority representative by Compact Video Services, Inc. (CVS) at all intervening times until August 5.
- 5. Respondent ATS is a successor to CVS and as of August 5 has employed a fully representative complement of employees in the unit previously recognized by CVS and described above, while immediately commencing to engage in a substantial continuity of CVS' previous operations.
- 6. IATSE made a valid bargaining demand to Respondent ATS for recognition in the above-described unit on August 6, which demand Respondent refused and continues to refuse.
- 7. By failing and refusing to recognize and bargain collectively with IATSE as exclusive representative of employees in the appropriate unit described above since August 6, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.
- 8. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. There remains the questions of how recognition should be extended for the unit in present day terms, and whether any monetary liability attaches for Respondent's refusal to recognize the Union.

At the point in time Respondent impermissibly failed and refused to recognize the Union, the unit was comprised of employees working at the two Alameda Avenue buildings and totaling approximately 100 persons. Since that time in August the telecine and duplicating employees that had worked at Lankershim Boulevard. in North Hollywood have completed a physical relocation to the technical center as renovated from a former office facility. A small group of CVS employees were also relocated there, plus some duplicating employees formerly at the physically separate Image

Lab. The former Lankershim Boulevard. employees number about 30, while another approximately 20 technical employees moved to this nearby building from the established Alameda Avenue locations of CVS.

The General Counsel advances as a "better view" that the individuals formerly at Image Transform "have now become part" of the former CVS unit for which recognition is entitled. This contention relies on *NLRB v. Winco Petroleum Co.*, 668 F.2d 973, 982 (8th Cir. 1982), the General Counsel notes that the CVS unit remains substantially intact, and although now part of a larger corporation has nonetheless retained some degree of its separate identity within the larger organization.

The Union, analogizing to *Border Steel Rolling Mills*, 204 NLRB 814 (1973), also proposes that the bargaining unit be considered an expanded one, from which it can be "reasonably concluded" that the technical employees "joined" in the functional work of ATS/4MC after the acquisition, and thus created an enlargement of the unit. Respondent, of course, has no position on the significance of these post-acquisition changes, because of its basic and continuing contention that the CVS unit was not an appropriate one "both before and after the sales transaction."

The tension on this point is generated by weighing whether the fact that former Image Tranform employees now performing identical and intermingled work of tape operating, telecine and dubbing must be folded into the unit as a numerically minor portion of the overall workforce, or whether they retain an entitlement to first have a voice in the matter of their representation.

The court's opinion in *NLRB v. Jeffries Lithograph*, supra at 468–469, contained pertinent language. Referring to the very point of employee free choice, the court held that the period immediately following a change in the employment relationship was a "time when employees, both holdovers and new hires, may need stability in their working environment most." The same court had also earlier written that "[I]n balancing the conflicting interests involved [with a successor employer], we note that the prerogative of employers to rearrange their business must be balanced by some protection to employees affected by abrupt changes in the employment relationship. *Westwood Import Co. v. NLRB*, 681 F.2d 664, 668 (9th Cir. 1982).

I believe from the fact that all technical employees are now in such close proximity, and that Respondent should not profit from its deliberate mixing of such employees while in a mode of unremedied unfair labor practices, that it is preferable to view the relocated employees as having become part of the core unit that is defined by job classifications. This is consistent with *Royal Vending Services*, 275 NLRB 1222, 1233 (1985), in which a unit description was "tailored to conform to the realities of Respondent's operation [and which refers] to the new location at which those employees work." Accordingly, I consider all telecine, tape operating, duplication, standards conversion, engineering and vault employees now located at 2820 Olive Avenue to be construed as within the bargaining unit entitled to recognition by carry-over from CVS.

On the point of monetary liability the General Counsel stated plainly at the outset of trial that no backpay, or by intimation any restoration of benefits, was being sought. However the Union has reserved its position of seeking such an

enlarged remedy, and it has standing to do so. See *Sunland Construction Co.*, 311 NLRB 685 (1993).

The *Burns* opinion created an exception to the court's holding that a successor employer is ordinarily free to set initial terms of employment. The exception is often referred to as the "perfectly clear" doctrine, a meaning derived from the court's following language in *Burns*:

[T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. [406 U.S. at 294–295.]

The Board interpreted this exception in *Spruce Up Corp.*, 209 NLRB 194 (1974), to be applicable where a successor employer declared its intention to hire the predecessor's employees, but offered continued employment only on different terms. This is the situation obtaining here, where Respondent consistently cautioned that new terms would apply, and its operative hiring document plainly specified lower wage rates in many instances. Thus the intent to alter existing terms and conditions was "announce[d] clearly," and no former CVS employee could reasonably be said to have been misled into believing that a continued retention in employment would be without change to such terms and conditions. Cf. *Worcester Mfg.*, 306 NLRB 218 (1992).

A full member, divided Board recently decided *Canteen Co.*, 317 NLRB 1052 (1995). The several opinions in the case thoroughly discussed *Spruce Up*, and set forth differing views of how it should be applied to the facts in *Canteen Co.*

Briefly stated, the facts in *Canteen Co.* were that a successor employer undertook initial contact with both the incumbent union and the four individuals of the bargaining unit, this during the approximate month-long period before it would commence operations. Contact with the union was essentially to seek agreement that a "working manager" position could be utilized, a concept that would not have been allowable under the predecessor's contract with the union. Contact with the employees was to progressively ascertain whether they would remain to work much as they had done with the predecessor employer, to tentatively discuss union representation, and to assess their likely responses when proposed pay rates would be divulged.

In various conversations three employees who had applied to the successor in response to a posted invitation declined the job offers actually made. This occurred about a week before the successor was to commence operations, was done after the job offers as fully made carried hourly pay reductions in a general range of 20 percent, and after advice was received "for the first time" that the successor would not adhere to all former conditions of employment. The fourth member of the bargaining unit never formally applied, because of what she understood were reduced wages being offered to her colleagues. The series of contacts with the Union led to a fractious conclusion when, on "the day before the [successor] was to begin operations," the successor suddenly refused to recognize the union in further dealings because "they legally do not represent the employees."

The Board held in Canteen Co. that this successor had by its conduct made it "perfectly clear," both by its contacts with the union and discussions with employees, that it "intended from the outset" to hire all the predecessor's employees. This conclusion was reinforced by it also having communicated to the union a desire that the predecessor employees serve a probationary period. This and other circumstances were viewed as the "plan to retain" such employees, effectively and clearly communicated to the union. The Board disagreed with dissenting members who would interpret Spruce Up as applying only when the new employer failed to announce initial employment terms prior to, or simultaneously with, the extension of unconditional offers of hire. The controlling opinion in Canteen Co. emphasized this by discussion of Fremont Ford, 289 NLRB 1290 (1988), a case in which significantly different employment conditions were not announced to individuals until the hiring process was underway. The controlling opinion also found support for its rationale in Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976). In that case a successor had made an unequivocal statement of its "intent to hire" all the predecessor's employees months before their services would be needed to start a new school year. Although enforcement of Roman Catholic Diocese was denied, the controlling opinion in Canteen Co. believed this to have represented the reviewing court's unduly restrictive view of Burns. Chairman Gould concurred separately in an opinion questioning even "the validity of Spruce Up," as "a misreading of Burns."

I believe Canteen Co. must be distinguished from this ATS matter under consideration. It is first noteworthy that entirely different dynamics provide a contrasting situation. In Canteen Co. the takeover resulted from a structured bidding process for a food service contract, which provided the successor with a specific month-long period in which to prepare for commencement of operations. Cf. Southfork Systems, 313 NLRB 274 (1993). Here the acquisition was uncertain until the very day of the transaction, for without all financial facets being agreed to the fundamental purchase of operating assets would not have occurred. The difference between August 4 and 5 was thus a matter of whether the slipping CVG enterprise would continue its struggle for existence, or whether a cash-flush acquirer would supplant it. When all fell into place on August 4 it was akin to turning a switch, and the array of potential employees were wedded to the assets; i.e., workspace, infrastructure, equipment, and all other tangibles necessary to continue with work in progress. Notably even Donlon had no known employment with the new entity until the transaction closed in the afternoon of August 4 at the New York City locale specified for consummation. This showing of a mixed situation involving uncertainty and a compressed time line is best exemplified by Walston's statement, one I credit as his genuine view of the matter, that "[W]e (ATS) came to Los Angeles and we started a new company. We had assets to operate."

Within this context of time constraints, another distinguishing factor is that ATS expressly announced the intention to invoke new terms and conditions of employment when Walston wrote to all employees on July 30. As would be predicted his notification also expressly conditioned further action on completion of the sale. Another distinction is the placing of "positions available" ads in trade journals just before the July 30 notifications. While no evidence arose that

these ads were fruitful, neither is it known that applications were not received and reviewed. This also therefore contrasts with *Canteen Co.*, in which the Board noted that the successor "took no action to attract or consider outside applicants until a few days before its scheduled opening."

Canteen Co. also involved extensive precommencement contact with the union involved. The Board narrowed the significance of such contact, but did write that Respondent's disqualification from the "perfectly clear" doctrine was also related to "the agreement it reached with the [U]nion." Here there was a total absence of preacquisition contact with IATSE, and while I do not condone the imprudent disregard of the Union it does represent yet another point of distinction.

Finally and most importantly I do not interpret the August 3 dated hiring document used by ATS as an unconditional offer that was so late in point of time as to void the previous "announcement" of new terms and conditions. A transaction document had preserved to Respondent the power, in its sole discretion, to set such new terms and conditions. The written advice of July 30 openly repeated this intention. The fastclosing, yet still unfulfilled, transaction would be futile without a workforce that could continue in "seamless" performance with the assets tentatively to be acquired. In this context the August 3 documents, again disclaiming any applicability of previous terms and conditions and expressly setting new pay rates in many instances, were conditioned on individual acceptance by each CVG employee. The reaction of such employees could not necessarily have been well anticipated, and thus the new workforce could not have been clearly discerned. As Deschryver testified in regard to his understanding as to a Robert Berryson, that 15-year service employee of CVS was offered continuation in his tape operator classification but at a nearly 50-percent reduction from his \$30per-hour wage, causing him to be "insulted by the offer and did not accept." In the contrasting situation of editor Mike Sachs, this 4-year service employee simply quit even though his \$65-per-hour wage was assured of continuation These imponderables, plus the chiefly influencing time compression of the uncertain transaction, cause me to conclude on balance that the "perfectly clear" caveat of Burns should not be applied here.

On this basis I cannot adopt the Union's proposed remedy, and in agreement with the General Counsel recommend only that a bargaining order be entered. For this reason the case remedy shall not include a monetary aspect, or recission of changes in terms and conditions of employment as made by Respondent effective August 5. In the recommended Order to follow, and the associated notice to all employees, the Respondent's name of ATS Acquisition Corp. shall be construed to include the name 4MC wherever this is necessary and appropriate to effectuate the intended remedy.

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, ATS Acquisition Corp., Burbank, California, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to recognize and bargain collectively with International Alliance of Theatrical Stage Employees (IATSE) as exclusive bargaining representative of the employees in the following appropriate unit.

All employees employed at Respondent's Burbank, California facilities as videotape machine operators, videotape editors, maintenance engineers, film transfer technicians, electronic graphics operators, computer personnel, fabrication, art and graphics departments members, boommen, audio 2 technicians, audio mixers, video projection technicians, telecine operators, recotech, tape cleaning, repair, evaluation and storage employees and all classifications set forth in the wage schedules of the collective-bargaining agreement effective August 1, 1992; excluding all other employees, guards and supervisors as defined in the Act

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.
- (b) Post at its facility in Burbank, California, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to recognize and bargain with International Alliance of Theatrical Stage Employees (IATSE) as the exclusive bargaining representative of employees in the appropriate bargaining unit set forth below.

All employees employed at Respondent's Burbank, California facilities as videotape machine operators, videotape editors, maintenance engineers, film transfer technicians, electronic graphics operators, computer personnel, fabrication, art and graphics departments members, boommen, audio 2 technicians, audio mixers, video projection technicians, telecine operators, recotech, tape cleaning, repair, evaluation and storage employees and all classifications set forth in the wage

schedules of the collective-bargaining agreement effective August 1, 1992; excluding all other employees, guards and supervisors as defined in the Act

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the appropriate bargaining unit stated above.

ATS ACQUISITION CORP., INC.